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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-518

JASPER M. BRANCATO and ZAIRA BRANCATO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Jasper M. Brancato and Zaira Brancato, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 11, 1975, and the denial of their petition for rehearing or rehearing by the Court en Banc entered on August 4, 1975.

OPINIONS BELOW

Final Judgment Granting Motion for Return of 42 Boxes of Records, Registration Cards, and Guest Folios and Suppressing Their Use in Evidence, filed January 8, 1975, in Civil Action No. 73CV608-W-3, in the United States District Court for the Western District of Missouri, Western Division, in cause entitled "In The Matter Of The Application Of Jasper M. Brancato And Zaira Brancato For The Return Of Seized Property", not reported, appears as Appendix "A" hereto.

The Opinion of the United States Court of Appeals for the Eighth Circuit in Cause No. 75-1139 therein, not yet reported, appears as Appendix "B" herein.

Order of the United States Court of Appeals for the Eighth Circuit dated August 4, 1975, denying the petitioners' Petition for Rehearing and Petition for Rehearing en Banc, appears as Appendix "C" herein.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 11, 1975, and a Petition for Rehearing or Rehearing in the Court en Banc timely filed, was denied on August 4, 1975; this Petition for Writ of Certiorari was mailed to be filed within ninety (90) days of that date. This Court's jurisdiction is invoked under *18 U.S.C. §1254(1)*, and is timely filed under the provision of *28 U.S.C. §2101(c)*.

QUESTIONS PRESENTED

1. Whether the motel business records of prior owners left at the motel for storage by the prior owners were constitutionally and lawfully seized from the new owners by means of a grand jury subpoena.

   A. Whether petitioners, the prior owners, were in constructive possession of said business records.

   B. Whether the use of the grand jury subpoena violated the petitioners' privilege against unreasonable searches and seizures.

   C. Whether the petitioners' privilege against self-incrimination was denied.

2. Whether the Court of Appeals erred in making its own findings of fact without finding that the findings of fact by the District Court were clearly erroneous.

CONSTITUTIONAL AND STATUTORY PROVISION AND RULES INVOLVED

United States Constitution

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment

"No person . . . shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Title 28, Federal Rules of Civil Procedure

Rule 52(a)

"In all actions tried upon the facts without a jury. . ., the Court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . ."

STATEMENT OF THE CASE

This is a joint petition for Writ of Certiorari presented by Jasper M. Brancato and Zaira Brancato. Petitioners originally filed a motion in the United States District Court for the Western District of Missouri seeking the return of 42 boxes of business records which were seized by means of a grand jury subpoena. They also sought to suppress from the use in evidence said records and all evidence leading therefrom, in any criminal or civil action. The United States District Court for the Western

District of Missouri entered a judgment and order sustaining their motion and ordering the return to them of said 42 boxes of motel business records, and suppressing their use in evidence. The United States Court of Appeals for the Eighth Circuit reversed the District Court, and petitioners now seek certiorari.

The petitioners are husband and wife, and are the former owners of the Ramada Inn, 5000 East Linwood, Kansas City, Missouri. Both are presently charged by indictment and are awaiting trial in the United States District Court for the Western District of Missouri on two indictments; the first charging mail fraud arising out of the filing of allegedly fraudulent Missouri State sales tax returns, and the second indictment charges income tax evasion.

Petitioners owned and operated, as individuals and not as a corporation, said Ramada Inn, from 1966 through 1973. The records in question included registration cards, guest folios, and other usual business records. These records were not necessary to the continued operation of the motel by the new owners, and were for the period of operation by the petitioners while they were owners and operators of the motel.

The records in question were seized by an Internal Revenue agent pursuant to a subpoena duces tecum issued by the Clerk of the United States District Court for the Western District of Missouri on the application of the United States, on or about October 17, 1973, after the movants had been indicted by a federal grand jury on the first indictment previously referred to, on October 11, 1973. The subpoena was directed to Larry D. Fransen, or his designee, Ramada Inn, 5000 East Linwood, Kansas City, Missouri, directing him to produce before the United States Grand Jury, all business records of the Ramada Inn,

5000 East Linwood, "within your possession, custody or control", relating to the income and expenses of such business for the calendar years 1970 and 1971. The subpoena was apparently altered by one of the serving agents to include the designation, "for the years 1968-1969, and 1972". The petitioners, on November 13, 1973, filed a civil motion for the return and suppression of these records. It is this civil proceeding that gives rise to the present petition.

The records in question were the records of the petitioners made by them or under their care while they were the owners and operators of the Ramada Inn, and prior to the sale to the new owners. The sale was in conformity with a formal agreement of sale with the Griffin Inns of Minneapolis, which company took possession of the Ramada Inn through its agents and employees on July 7, 1973. The Ramada Inn continued to be operated by Griffin Inns' designee, the Kansas City Inn, a limited partnership.

An evidentiary hearing was held in the District Court below, The Honorable William H. Becker, District Judge, presiding. During the hearing James C. Harris, the new general manager of the Ramada Inn, testified that on the day that he took possession on behalf of Griffin Inns from the petitioners, that the petitioners took some of the motel records with them without objection from him, for the reason that the records were not necessary for the continued operation of the motel. Mr. Harris further testified that approximately 40 boxes of records were stored in a third floor linen room which was kept locked, and that the only people who had keys were the housekeeper, Ellen Dick, and himself. Mr. Harris further testified that neither he nor any of the other employees of Griffin Inns ever looked at the 42 boxes on any occasion. When the records were seized by the Internal Revenue Service agents Mr.

Harris made no attempt to notify the petitioners of the seizure. The petitioners at that time were outside of the United States temporarily. Approximately six boxes of records were not seized pursuant to the subpoena, and were subsequently picked up by the petitioners when they returned from Europe, after they were made aware of the seizure. The contract of sale included a customer list and Harris testified that when the property changed hands the petitioners left with him a box which contained an alphabetical listing of guests who stayed at the motel regularly, and that this was considered to be the customer list.

Ellen Dick, the housekeeper, testified that she was familiar with the records being stored in the third floor linen room for "many years". She testified that near the end of September, 1973, the petitioners returned to the motel, and that Harris told her to take the Senator (the petitioner, Jasper M. Brancato, is a Senator in the Missouri Legislature) up to get his records. Mrs. Dick also testified that on that occasion approximately a dozen boxes of records were removed, and that the petitioner advised that he would return to pick up the remainder of the records, but that it would be necessary for him to get a truck in which to haul them. Mrs. Dick testified that Mr. Harris, the general manager, advised her that the petitioners would be by to pick up their things and records. Senator Brancato testified that he had had a discussion at the time of the sale with the accountant for the new owners, and that it was understood that all the new owners wanted was a customer list, and that a number of representatives and agents of the new owners were present when he took 18 to 19 boxes of records from the motel premises on the date that possession was changed, July 6, 1973. Senator Brancato further testified that he first learned of the seizure of the records by the Internal Revenue Service after

he had returned from Europe and when he had returned to the motel to pick up his mail, some of which was still being sent to the motel. The seizure was slightly over three months after the sale and transfer of possession.

Mr. Harris, the general manager for the new owners, when served with the subpoena was advised by the agents that he would be excused from appearing before the grand jury if he would deliver the records to the Internal Revenue agent. He, in turn, made the records available to the agents who returned at a later time and removed them. It was between the first visit by the agents and the time when the agents returned to remove the records that the subpoena had been changed by interlineation. This change was initialed by Internal Revenue Agent Broderick. The petitioners at no time consented to this voluntary delivery of the documents to the Internal Revenue agents. It was this that the District Court below found to be an unlawful search and seizure, relying on the Eighth Circuit Court of Appeals decision in *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956), and upon this Court's decision in *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973).

Despite the findings of fact by the District Court, the Court of Appeals below found different findings of fact and held that its prior decision in the *Schwimmer* case was not in point.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of Another Court of Appeals.

Not only does the Opinion below conflict with a decision of this Court in *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548, and with a decision of the Second Circuit Court of Appeals in *United States* v. *Guterma*, 272 F.2d 344 (2nd Cir. 1959), but conflicts with a prior decision of the Eighth Circuit Court of Appeals itself in *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956).

In *Schwimmer*, supra, an attorney was under investigation by a grand jury for tax evasion and for official corruption. He had ceased active practice of law and had placed his files in storage with the Dean Rubber Manufacturing Company, and had left the United States for Puerto Rico. Two subpoenas were issued to Dean Rubber Company to produce Schwimmer's files. When Schwimmer learned of these subpoenas he returned to the United States and filed a motion to quash based upon his *Fourth Amendment* privilege against unreasonable searches and seizures. The Court of Appeals there, relying on *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, held that the *Fourth Amendment* privilege against unreasonable searches and seizures applies to the compulsory production of a person's private books and papers through a subpoena duces tecum.

In *Schwimmer*, as here, the government argued that the *Fourth Amendment* protection did not apply since the petitioner was not in possession of the records, but in *Schwimmer* the Eighth Circuit Court of Appeals held that:

> "The law recognizes no distinction between constructive possession with control, and physical possession, as a basis for subpoena to compel production, so that such process directed to and served upon an owner, who is in constructive possession and control, is as legally capable of commanding the production of his books and papers as is one against a third party, who is in physical possession of them for him."

The Eighth Circuit then held that both persons thus would have a right to suppress the unlawful seizure of such records, and held, at page 861:

> "Schwimmer legally had such possession, control, and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third party naked possessor to produce and deliver them."

In *Schwimmer* the Court was not faced with a *Fifth Amendment* self-incrimination privilege contention as is presented also in the present case. The Court of Appeals below in our present case did not pass upon the issue of self-incrimination. In our present case the trial court who heard the testimony found that the petitioners were in constructive possession with control of the records in question, and that Griffin Inns, the new owners of the Ramada Inn, were merely custodians thereof. It is quite obvious from the evidence that the new owners of the Ramada Inn had given up any right to ownership and had never exercised any other right, to the records in question, but were merely storing them, as custodians, for the petitioners, until the petitioners had the opportunity and means with which to remove the records in question. True, the new owners of the Ramada Inn had the keys to the room in

which the records were locked, but in *Schwimmer*, the Dean Rubber Company had the keys to the building in which the records were kept. The Eighth Circuit below did not apply the proper standard for review of the findings of the District Court. See *Rule 52*, Federal Rules of Civil Procedure, *Title 28*.

The Eighth Circuit Court of Appeals has defined constructive possession, see *Sewell* v. *United States*, 406 F.2d 1289 (8th Cir. 1969), as being:

> "A person who, although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."

In *Couch* v. *United States*, supra, this Court had before it a situation where the petitioner was the owner of a restaurant, and she had, for some years, given her bank statements, payroll records, and other records, to her accountant for the purpose of preparing a federal income tax return. The Internal Revenue Service commenced an investigation of Ms. Couch and an Internal Revenue Service summons was served on her accountant to examine and seize her records. The accountant refused to let the Internal Revenue agents see the records. When the agent returned on the return date of the summons, the accountant had already delivered the documents to Ms. Couch's attorney. The Internal Revenue Service then petitioned the district court for enforcement of the summons, and Ms. Couch intervened, asserting her ownership of the records warranted a *Fifth Amendment* claim against self-incrimination, and that enforcement of the summons would violate her *Fourth Amendment* right to be secure from unreasonable searches and seizures. This Court in *Couch*, cited *Boyd*

v. *United States,* supra, for the proposition that: "Any forcible and compulsory extortion of a man's own testimony, or of his private papers, to be used as evidence to convict him of crime" is in violation of the *Fourth* and *Fifth Amendments.* This Court in *Couch* did reject the use of ownership as circumscribing the perimeters of the *Fifth Amendment* self-incrimination privilege. The Court stated that possession "bears the closest relationship to the personal compulsion forbidden by the *Fifth Amendment*". This Court, however, went on to say, page 620 n.20:

> ". . . We do not indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids. Yet, contrary to any intimation in the dissent, we do not adopt any per se rule."

The Court said further, at page 618:

> "We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear, or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."

This Court, in *Couch,* then cited with approval, two Court of Appeals' decisions where constructive possession rationale was employed. These two cases were *Schwimmer* v. *United States,* supra, and *United States* v. *Guterma,* 272 F.2d 344 (2nd Cir. 1959). It is obvious under the facts in this case that the petitioners had a reasonable expectation of privacy in their records, and that the records were

only temporarily left with the new owners for lack of sufficient means with which to move them.

The Second Circuit Court of Appeals in *United States* v. *Guterma,* had before it a situation where the taxpayer in question stored his personal records in a safe in offices of a corporation in which the taxpayer was serving as chairman of the board. There the corporation had no access to the safe and only the taxpayer and one other person had the combination to the safe. The Second Circuit Court of Appeals upheld the taxpayer's assertion of *Fifth Amendment* privilege as to his personal records in face of a grand jury subpoena directed to the corporation.

It is certainly not an unusual situation where a seller of property may temporarily leave his personal property at the premises for later transportation and where the new owner foregoes, expressly or otherwise (and here it was expressly), any right to ownership or control over the items so left, it should not be said that the old owners are not in sufficient possession to be able to exert their privilege against unreasonable searches and seizures and self-incrimination as guaranteed by the *Fourth* and *Fifth Amendments* of the United States Constitution. The question may arise in other cases, of the effect of constructive possession over items that are left with a custodian with the intention that the custodian have access to the information contained in the papers. *Couch* refrained from ruling upon that distinction, but it is not present in petitioners' case, for here, by agreement, the new owners were satisfied with the particular records, as being the customer list referred to in the sales contract, and it was neither the new owners' nor the petitioners' intention that the new owners have access to the information contained in the records. It was the intention of all parties that the Bran-

catos remove, at their convenience, the records in question.

The Court of Appeals below misinterpreted this Court's decision in *Couch*, saying, at page 5 of the Opinion that

> "Even a casual analysis of the facts in *Couch* reveals that the taxpayer herein had far greater right to possession and control of the documents than do the taxpayers before us."

In *Couch*, the books and records were delivered to a third person over a long period of time, and for the purpose of allowing the custodian access to the records in the preparation of Couch's tax returns. Certainly that was not the situation in our present case.

2. The Decision Below Involves an Important Question of Federal Law Which Should Be Settled by This Court.

Two of the very most important constitutional rights of individuals is their privilege against self-incrimination, and their right to be protected from unreasonable searches and seizures, rights guaranteed by the *Fourth* and *Fifth Amendments* to the United States Constitution. These rights continually confront law enforcement officers, attorneys, and the courts, and this Court should set forth in its decision, guidelines to the courts below, appellate and trial, and to law enforcement officers as well as individuals as to what those rights are. In our present case we have the question of the exerting of those rights by a former owner of property over the seizure from the new owners of personal items that were left on the premises temporarily pending their being removed. This question has never been, to petitioners' knowledge, directly passed upon by this Court.

3. The Court of Appeals Below Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings So As to Call for the Exercise of This Court's Power of Supervision.

The District Court made specific findings of fact in its "Final Judgment Granting Motion for Return of 42 Boxes of Records, Registration Cards, and Guest Folios, and Suppressing Their Use in Evidence", including a find-
(App. B, p. 28):
ing (App. A, p. 18), "The carefully drawn written agreements (for the sale of the Ramada Inn) . . . establish as a matter of fact and law that the movants owned, individually, the 42 (rather than 41) boxes of documents seized under the grand jury subpoena", and that certain personal property of the movants, including the 42 boxes in question "were, by agreement, stored on the premises of the Inn in storerooms as property of the movants . . .". The Court of Appeals in its Opinion, however, made different findings of fact, including (App. B, p. 26), "Although the evidence on the ownership of the seized records is somewhat equivocal, the language of the contract clearly places ownership in the purchaser." There was no finding by the Court of Appeals that the findings of fact by the District Court was clearly erroneous, nor any indication that the Court of Appeals gave due regard to the opportunity of the trial court to judge the credibility of the witnesses. The Court of Appeals merely decided the subject, without actually seeing and observing the witnesses, anew, and decided it, apparently, upon the written word of a contract, without consideration for the testimony of the parties regarding an oral modification of that contract after it was executed. Federal Rules of Civil Procedure, *Rule 52(a)*, provides in part, that in all actions tried upon the facts without a jury where the trial court, by its opinion, memorandum, or decision, makes findings of fact, that such findings of fact,

"shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Court of Appeals has departed from the rules of civil procedure set down by this Court and approved by Congress, and this Court should, therefore, exert its supervisory power and reverse the decision of the Court of Appeals and reinstate the decision of the District Court made in conformity to its proper findings of fact.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 73CV608-W-3

IN THE MATTER OF THE APPLICATION OF JASPER M. BRANCATO AND ZAIRA BRANCATO FOR THE RETURN OF SEIZED PROPERTY

Final Judgment Granting Motion for Return of 42 Boxes of Records, Registration Cards, and Guest Folios and Suppressing Their Use in Evidence

(Filed January 8, 1975)

Jasper M. Brancato and Zaira Brancato (movants) initiated this independent civil action by filing a motion for return of 41 boxes of records, registration cards, and guest folios relating to the operation of a Ramada Inn from 1968 through 1972, formerly operated by movants as individuals. The movants alleged that these records were unlawfully seized by agents of the Internal Revenue Service; that the seizure was made pursuant to a subpoena *duces tecum* issued by the Clerk of this Court on or about October 17, 1973, on application of the United States, after movants had been indicted by a grand jury; that the subpoena *duces tecum* was directed to Mr. Larry D. Fransen or his designee, Ramada Inn, 5000 East Linwood, Kansas City, Missouri, directing him to produce

before the United States Grand Jury on October 23, 1973, all business records of the Ramada Inn, 5000 East Linwood, "within your possession, custody or control" relating to income and expenses of the business of the Ramada Inn for the years 1970 and 1971; and that the subpoena was apparently altered (and initialed "M.J.B.") by one of the agents serving the subpoena to include insertion of the phrase "for the years 1968-1969-and 1972." After response to the motion by the Government, a plenary evidentiary hearing was held.

The evidence established beyond doubt that the Ramada Inn was operated by the movants as individual coowners until a formal agreement of sale thereof to "Griffin Inns" of Minneapolis (GI) which took possession on July 7, 1973, through its agents and employees.

The carefully drawn written agreements contained in the Proof File of Kansas City Inn, a Limited Partnership (D.Ex.2), and the Restated Agreement for Sale and Purchase of Ramada Inn (D.Ex.1) establish as a matter of fact and law that the movants owned individually the 42 (rather than 41) boxes of documents seized under the grand jury subpoena, although other current records necessary for continuance of the business became the property of the purchaser Griffin and its designee Kansas City Inn, a limited partnership. Some personal property of movants and a number of other records including those in the 42 boxes in question belonging to movants, were by agreement stored on the premises of the Inn in storerooms as property of the movants, who removed some of the records before October 17, 1973.

On October 17, 1973, Internal Revenue Agent Broderick served the grand jury subpoena *duces tecum* (P.Ex.2) on James C. Harris, general manager for the purchaser

of the Ramada Inn. At this time no effort was made by Harris or any other agent of the purchaser in possession to notify movants who had been accurately reported in the news to be outside the United States.

Harris, on being advised that his appearance before the grand jury would be excused if he delivered the records, elected to deliver the records rather than to appear. The records were made available to the agents of the Internal Revenue Service who removed them later. When the subpoena *duces tecum* was first served on Harris it did not contain the interlineations in manuscript that called for records for the additional years. These interlineations were made and initialed by agent Broderick after the initial service, and apparently after he had ascertained the scope of the stored records at the Inn.

No consent of movants was sought or secured by anyone for the delivery of the records to agents of the Internal Revenue Service. The movant Jasper Brancato learned of the delivery of records when he went to the Inn, on his unscheduled return to Kansas City from his trip on October 18, 1973, because of his indictment on October 11, 1973. He surrendered on October 19, 1973, and learned about a week later of the prior delivery of his papers to the Government from the housekeeper at the Inn.

If a subpoena *duces tecum* to appear with documents before a grand jury is properly and in good faith issued and served on the custodian of documents who is owner of the documents, or who has lawful possession of the documents, or who has the express or implied consent of the owner to voluntarily deliver the documents, the custodian may voluntarily agree to surrender possession of the documents to the Government to secure excuse from

appearance before the grand jury with the documents as required by the subpoena *duces tecum*.

If however, an individual under investigation, who owns and has the exclusive right of possession to the documents, does not consent to voluntary delivery of the documents by another on whom such a subpoena *duces tecum* has been served, the subpoenaed person may not lawfully deliver possession to Government agents to avoid appearance before the grand jury. Such a transaction results in an unlawful search and seizure of papers of the owner.

These principles were enunciated by the Court of Appeals for the Eighth Circuit in the following language in *Schwimmer* v. *United States*, 232 F.2d 855, 860-861 (8th Cir. 1956):

"The compelled production of one's private books and papers through a subpoena duces tecum, for use against him in a criminal proceeding, is, of course, as much within the guaranty of the Fourth Amendment against unreasonable searches and seizures as is a reaching of them by means of a warrant. Boyd v. United States, 116 U.S. 616, 622, 6 S.Ct. 524, 29 L.Ed. 746.

"The term 'criminal proceeding', within this rule, includes the investigation of a grand jury, since such a body is merely an adjunct or 'appendage' of the court, and the things it does represent an incident or process in the part played by the judicial system in criminal law enforcement. 24 Am.Jur., Grand Juries, § 2.

"Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final

or appealable order. Perlman v. United States, 247 U.S. 7, 12, 13, 38 S.Ct. 417, 62 L.Ed. 950.

"Such a motion to quash is entitled to be made by the owner of books and papers, in relation to a grand jury investigation of him, as to a subpoena duces tecum issued against a third party, in whose possession the books and papers are, but who is merely a custodian, without personal right in the books and papers as such, and with constructive possession and control of them thus remaining in the owner. The law recognizes no distinction between constructive possession, with control, and physical possession, as a basis for a subpoena to compel production, so that such process directed to and served upon an owner, who is in constructive possession and control, is as legally capable of commanding the production of his books and papers as is one against a third party, who is in physical possession of them for him. The question of whether to issue a subpoena against the owner or against the third party thus ordinarily is in such a situation merely one of procedural choice and convenience. Substantively, each involves, except as to the task of appearing and making delivery, the same aspects of reach, deprivation and seizure-effect against the owner.

"We are accordingly unable to see any merit in the argument made by the Government here that, since the books and papers of the Dean Rubber Manufacturing Co. and the subpoenas involved were issued against it, Schwimmer had no basis for claiming unreasonable search and seizure against him and so could not make a motion to quash on that ground. We think that Schwimmer legally had such possession, control

and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third-party naked possessor to produce and deliver them.

"The constitutional safeguard against unreasonable searches and seizures is more than a reach at mechanics in process. It is concerned with intrinsic as well as extrinsic aspects, and its look is at reality, not theory, in respect to the whole of what is being done. In general terms, the test to be applied under it is whether the thing done or attempted to be done, in the sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected. But since, as emphasized, the question of reasonableness or unreasonableness in search is one of realistic and not theoretical approach, the test stated is of course merely a principle and not a rule, and so is of subjective value only, and not of objective force, in the making of specific appraisal."

The holding in the *Schwimmer* case was recently cited by the United States Supreme Court in the case of *Couch* v. *United States*, 409 U.S. 322, 333, 93 S.Ct. 611, 34 L.Ed.2d 548, 557 (1973), in support of the conclusion that ". . . situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."

Under these circumstances, it is concluded that the 42 boxes of records were unlawfully seized and should be returned to the movants.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that the motion herein for the return of seized property and the suppression of evidence be, and it is hereby, granted. It is further

ORDERED and ADJUDGED that the United States return to Jasper Brancato and Zaira Brancato the 42 boxes containing records, registration cards, and guest folios relating to the operation of the Ramada Inn, 5000 East Linwood, Kansas City, Missouri, possession of which was secured in lieu of appearance in response to a Grand Jury subpoena *duces tecum* issued October 17, 1973, requiring appearance of Larry D. Fransen or his designee before a grand jury on October 23, 1973.

/s/ William H. Becker

William H. Becker
Chief Judge

Kansas City, Missouri
Date: 1-8-75

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1139

IN RE: GRAND JURY PROCEEDINGS

JASPER M. BRANCATO, et al.,
Appellees,

v.

UNITED STATES OF AMERICA,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted June 11, 1975
Filed: July 11, 1975

Before BRIGHT, Circuit Judge, KILKENNY, Senior Circuit Judge,* and WEBSTER, Circuit Judge.

KILKENNY, Circuit Judge.

The United States appeals from a judgment granting appellees' motion to suppress and to return 42 boxes of records produced in response to a federal grand jury subpoena duces tecum.

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*The Honorable John F. Kilkenny, United States Senior Circuit Judge for the Ninth Circuit, sitting by designation.

Factual Background.

The records in question consist of registration cards and guest folios relating to the operation of a Ramada Inn from 1968 through 1972. The subpoena was directed to the manager of the Inn and required the production before the grand jury, in a tax-related matter, of all business records of the Inn "* * * within [appellees'] possession, custody or control * * *" pertaining specifically to the income and expenses of the business of the Inn for the years 1968, 1969, 1970, 1971, and 1972. It is undisputed that the Inn was operated by appellees during the years in question and that they were the individual coowners until they sold to the present owners, who took possession on July 7, 1973. The final agreement for the sale and purchase of the Inn between appellees and the purchaser contained the following provisions pertinent to our inquiry:

* * *

2. *DESCRIPTION OF PROPERTY.* The property being purchased is the land and buildings and other improvements thereon commonly known and designated as Ramada Inn, 5000-5100 East Linwood, Kansas City, Missouri 64128, hereinafter referred to as the 'Property'. The Property includes:

* * *

D. *Complete copies of all customer lists available and business records prepared, accumulated or compiled by Sellers* and/or any operating company retained by the Sellers (hereinafter called 'Operating Company') in the management and operation of the Property * * *. [Emphasis supplied.]

* * *

5. *CLOSING.* * * * Sellers shall execute and deliver to Purchaser the following, which shall be in form and substance satisfactory to counsel for the Purchaser:

* * *

C. Copies of all customer lists and business records, and an assignment of all licenses, rights and permits (held by Sellers which may lawfully be transferred to Purchaser) necessary or appropriate for the operation of the Property, all as described in Section 2D hereof * * *.

* * *

The record is clear that at the time of the service of the subpoena on October 17, 1973, the appellees had been out of possession of the property for approximately three and one-half months and had no ownership or possessory interest in the premises, nor any actual possession of the subject records. It is undisputed that Mr. Harris, the Inn manager upon whom the subpoena was served, and the Inn's housekeeper were the only persons who had access to the locked linen closet on the third floor of the Inn in which the boxes of records were stored. Although the evidence on the ownership of the seized records is somewhat equivocal, the language of the contract clearly places ownership in the purchaser. The evidence on actual possession is uncontroverted.

Discussion.

The lower court, in granting the motion to suppress, relied principally upon *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956). Our analysis of *Schwimmer* leads us to the conclusion that it is not in point as the facts are clearly distinguishable from those in the instant case. There, a lawyer had placed his office files in storage with

the corporation upon which the subpoena duces tecum was served. It was clear in *Schwimmer* that the corporation was a mere custodian, without personal rights in the books and papers as such, while constructive possession and control of them remained in the owner. Here, the corporation upon whom the subpoena was served had an absolute right to possession of, at least, copies, if not the originals, of the documents which were the subjects of the subpoena. The contract between the parties can be interpreted in no other manner. Beyond that, the corporation had the only key to the room in which the records were stored.

Likewise, *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959), upon which appellees rely, is readily distinguishable. There, the subpoenaed personal records of the taxpayer were stored in a safe within the offices of the corporation for which he served as chairman of the board. Only the taxpayer and an indicted co-defendant knew the combination of the safe, and the corporation had no access whatsoever to its contents. Recognizing the secure nature of the safe, the *Guterma* court emphasized that even if the safe itself were delivered to the grand jury room, it would still be the taxpayer who would have to deliver his own papers by opening the safe.

The *Schwimmer* and *Guterma* cases were placed in proper perspective by the United States Supreme Court in *Couch* v. *United States*, 409 U.S. 322 (1973). In *Couch*, the sole owner of a restaurant had delivered her books and records to an accountant for the purpose of preparing her income tax returns. A subpoena duces tecum was served on her accountant, who then had possession of the documents. The restaurant owner intervened in the subsequent enforcement proceeding initiated by an agent of the Internal Revenue Service to compel production of the

instruments pursuant to the summons. While conceding that the taxpayer had full ownership of the records and that the accountant was entrusted with their possession only for the limited purpose of preparing tax returns, the Supreme Court nevertheless affirmed the decisions of the lower courts requiring production of the documents. Since the owner in *Couch* had effectively surrendered possession of the documents to her accountant, the Court held she had no protectable interest in them and could not prevent their production. Even a casual analysis of the facts in *Couch* reveals that the taxpayer therein had a far greater right to possession and control of the documents than do the taxpayers before us.

In resolving the problem, the *Couch* Court put to rest any theory that ownership, in itself, is sufficient to exempt documents from use by the government without the taxpayer's consent. By way of a footnote, it employed the following pertinent language from *United States* v. *Cohen*, 388 F.2d 464, 468 (9th Cir. 1967):

> * * * But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. * * *

Quoted in 409 U.S. at 330 n.12. In the same tenor, the *Couch* Court quoted from *Perlman* v. *United States*, 247 U.S. 7, 15 (1918), as follows:

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever

> hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. *They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.* [Emphasis supplied.]

Quoted in 409 U.S. at 332, 333.

Although the district judge thought otherwise, the fact that the possession of the records by the accountants had stretched over many years was not the controlling factor in the decision. That is made clear by the court's assertion that *actual possession* of the documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime.

While stating the general rule as above, the Court in *Couch* recognized that situations would arise where constructive possession was so clear or the relinquishment of possession so temporary and insignificant as to leave the personal compulsion on the taxpayer substantially intact. As typical examples of these situations, the Court expressly cites the *Schwimmer* and *Guterma* cases. *Id.* at 333, 334 n.16.

In re Horowitz, 482 F.2d 72 (2d Cir. 1973), *cert. denied*, 414 U.S. 867, firmly supports our view that *Couch* is controlling on these facts. Our factual background is much stronger in support of the government's position than it was in *Horowitz*. Nor do we find anything in *United States* v. *Kasmir*, 499 F.2d 444 (5th Cir. 1974), *cert. granted*, ____ U.S. ____, 43 U.S.L.W. 3412 (January 27, 1975), to be in conflict with the view that the summons before us should be enforced.

Conclusion.

We hold that the principles stated in *Couch* v. *United States, supra,* control on the record before us and that the judgment of the district court must be reversed.

It is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1974

75-1139

In Re: Grand Jury Proceedings
Jasper M. Brancato, et al.,
Appellees,

vs.

United States of America,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 4, 1975